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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,)
12 Plaintiff,) No. CR99-0123 MAG (BZ)
13 v.)
14 JOANNA MARSH,) **ORDER DENYING MOTION TO**
15 Defendant.) **DISMISS**
16 _____)

17 On September 8, 1999, defendant's motion to dismiss
18 for denial of due process came on for hearing. Defendant
19 was represented by Eileen Burke, Esq. The government was
20 represented by Elizabeth Cohee, Law Clerk. I have
21 considered the moving and opposition papers, the arguments
22 of counsel and the testimony of Mr. Platt.

23 I am troubled by the government's lack of diligence in
24 investigating and prosecuting this matter. Absent a
25 compelling cause, no person should have to wait 12-15
26 months to have an ordinary drunk driving charge resolved.
27 Law clerk turnover is not an excuse. Indeed, if it is a
28 cause, the U.S. Attorney's Office should consider

1 reassigning drunk driving cases to attorneys. Even if the
2 defendant and her counsel were uncooperative, the
3 government had ample means to ensure defendant's appearance
4 in court.

5 However, before I can evaluate the government's
6 justification for the delay, defendant must make a
7 threshold showing of "actual, non-speculative prejudice"
8 resulting from the delay. This is a burden which the Ninth
9 Circuit has described as "so heavy" that it had only been
10 found twice in about twenty years. United States v.
11 Huntley, 976 F.2d 1287, 1290 (9th Cir. 1991). Defendant
12 has failed to meet this burden. Her assertion that her
13 recollection has dimmed with time is inadequate to
14 establish a due process violation without a further showing
15 this the loss meaningfully impaired her ability to defend
16 herself. This would be an especially difficult showing in
17 a case such as this in which the government will rely
18 heavily on scientific evidence such as breathalyzer results
19 and speed measurements. I am also skeptical that the
20 defendant would forget the details of her arrest so easily
21 since presumably it would be a quite memorable event to
22 someone not routinely arrested. As the government
23 suggests, her inability to recollect may well be due to her
24 alleged state of intoxication.

25 I did not find Mr. Platt's asserted lack of
26 recollection of the events surrounding the arrest entirely
27 credible, inasmuch as he seemed able to recollect with some
28 particularity the events immediately preceeding the arrest.

1 His testimony was that his recollection began to dim about
2 two months after the arrest; even the most diligent
3 prosecution would likely not have come to trial before his
4 recollection faulted. Nor is it clear how meaningful his
5 testimony would have been, inasmuch as Mr. Platt was not
6 present at the party.

7 As to Ms. Hall, defense counsel admitted that she has
8 not been contacted. It is entirely speculative that she is
9 unavailable and that she would offer testimony that would
10 assist defendant. In any event, she moved to Washington,
11 D.C., and became "unavailable" within two months of the
12 arrest. Accordingly, any prejudice from her
13 unavailability did not result from the government's delay.

14 For the foregoing reasons, defendant's motion is
15 **DENIED.**

16 Dated: September 8, 1999

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Bernard Zimmerman
United States Magistrate Judge

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